IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-494

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCALS 542, 542-A, 542-B,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM OF THE INTERVENOR, YORK COUNTY BRIDGE, INC., IN OPPOSITION

EARLE K. SHAWE,
CARROL HAMENT,
WARREN M. DAVISON,
SHAWE & ROSENTHAL,
Sun Life Building,
Charles Center,
Baltimore, Maryland 21201,
(301) 752-1040,
Attorneys for Intervenor.

The Daily Record Co., Baltimore, Md. 21202

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1. Petitioner's principal contentions — that its refusal to enter into the standard multi-employer contract with York County Bridge, Inc. was based on its disclaimer of any desire to represent York's employees or to do business with York (Pet. 13-14) — is contrary to the record and to the findings of both the Board and the Court of Appeals. Both the Board (Pet. A. 23-24, 26) and the Court of Appeals (Pet. A. 38-39, 41-42) found that the Petitioner was willing to enter into a collective bargaining agreement with York, but only if that agreement contained the illegal Section 11, which

would have impacted, not on York, but on another company whose employees were not represented by the Union. Moreover, the Board specifically found that the Union had not disclaimed an interest in representing York's employees, but that it was seeking to enlarge the scope of the bargaining unit by forcing other employees into the ambit of its proposed contract with York (Pet. A. 27). Thus, Petitioner's contrary assertions with respect to its motive present merely factual issues which have already been resolved adversely to it; such issues do not warrant Supreme Court review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

2. Whether the Non-Union Equipment clause of the proposed contract violates Section 8(e) of the Labor Act turns on whether "the agreement is addressed to the labor relations of the contracting employer [i.e., York] *vis-a-vis* his own employees" or is "tactically calculated to satisfy union objectives elsewhere." *National Woodwook Mfg. Assn. v. N.L.R.B.*, 386 U.S. 612, 644-645 (1967). That the latter was the purpose of the Union's picketing, and that that object has obtained throughout, was, as noted above, found by both the Board and the Court of Appeals. The Union's assertion that its motive has changed finds no support whatever in the record and is, indeed, contrary to the specific findings below. York was and is a union contractor and, as such, is entirely dependent on the Union for the referral of employees. The refusal to furnish employees to an employer dependent on such referrals constitutes restraint and coercion within the meaning of Section 8(b) (4) (ii) (A) of the Act. *Columbus Building and Trades Council (Kroger Company)*, 149 NLRB 1224, 1225-1227 (1964); *Local No. 5, Plumbers v. N.L.R.B.*, 321 F.2d 366, 370-371 (C.A.D.C., 1963), *cert. denied*, 375 U.S. 921.

3. The Board's order does not violate the "freedom of contract" principles of *H. K. Porter Co. v. N.L.R.B.*, 397 U.S. 99 (1970). The Union reached agreement with the employer association of which York was a member; the Board's order requires only that the Union offer that same agreement, or its successor, to York. It is the Union's attempt to treat York differently from the other association members — to add an unlawful "hot cargo" provision to the contract — that is the gravamen of the Board's and Court of Appeals' conclusions here. The Union's purported disclaimer is no disclaimer at all. This is not a jurisdictional dispute case, where two unions seek the same work and one later disclaims, thus vitiating the dispute. See, e.g., *Corrugated Asbestos Contractors, Inc. v. N.L.R.B.*, 458 F.2d 683 (C.A. 5, 1972), upon which Petitioner relies (Pet. 13-14). The Union is here demanding all construction work within its geographical area, and will not refer employees to companies not under contract to it. York is, and always has been, willing to live under the same contract terms as its competitors in the Contractors Association of Eastern Pennsylvania, of which it is a member (Pet. A. 22-24, A. 37-39). The Board's order requires only that the Union afford York that right.

4. That the Union violated Sections 8 (b) (4) (ii) (A) and 8 (b) (3) of the Act in 1971 would, without more, invalidate the Union's mootness contention (Pet. 15-16). But the fact is that the Union still refuses to execute an agreement with York or to refer employees to it. Thus, in neither the practical nor the legal sense is this matter moot, as even the dissenting judge below concluded (Pet. A. 54). *N.L.R.B. v. Mexia Textile Mills*, 339 U.S. 563, 567-568 (1950). The issue is both viable and important, and the Court of Appeals' enforcement of the Board's order herein will serve an important practical purpose.

CONCLUSION

There is no conflict among the circuits and the instant case presents no issue warranting review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EARLE K. SHAWE,
CARROL HAMENT,
WARREN M. DAVISON,
SHAWE & ROSENTHAL,
Sun Life Building,
Charles Center,
Baltimore, Maryland 21201,
(301) 752-1040,
Attorneys for Intervenor.

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